FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 718

BRAEBURN SECURITIES CORPORATION, an Illinois corporation,

Appellant,

vs.

ELBERT S. SMITH, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois; and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF ELBERT S. SMITH, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BENJAMIN S. ADAMOWSKI, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS, TO DISMISS OR AFFIRM.

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle St., Suite 900,
Chicago 1, Illinois, (FI 6-2000),

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County,
County Building, Chicago, Illinois,
FR 2-3000,

Counsel for Appellees.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
Assistant Attorneys General,
FRANCIS X. RILEY,
Assistant State's Attorney,
Of Counsel.

Printed by Authority of the State of Illinois

INDEX.

PAGE

Motion of Elbert S. Smith, Auditor of Public Accounts of the State of Illinois, et al 1

Statement 2

The Pleadings 2

The Decision of the Circuit Court of Cook Cunty, Illinois 3

The Decision of the Supreme Court of Illinois 3

The Context of the Legislation 4

The Federal Bank Holding Act of 1956 4

Reservation of Right to States to Restrict Acquisition of Bank Stock 6

The Classification Made in the Illinois Bank Holding Company Act of 1957 7

Suggestions in Support of this Motion to Dismiss or or Affirm:

I—The Federal questions tendered by this appeal are not substantial and do not need further argument 12

II—The alleged invalidity of The Illinois Bank Holding Company Act of 1957 by reason of a federal preemption of the field of bank holding company legislation is raised for the first time in this appeal 13

Certificate of Service 15

CASES AND STATUTES CITED.

McCulloch v. Maryland, 4 Wheat, 316 13

Federal Bank Holding Company Act of 1956 (12 U. S. C. 1841, et seq.) 5, 13

Illinois Bank Holding Company Act of 1957 (Ill. Rev. Stats. 1957, ch. 16½, pars. 71, et seq.) 3, 7, 12, 13

Stewart v. Brady, 300 Ill. 425 12

U. S. Const. Amend. 14 .....3, 12

United States v. du Pont & Co., 353 U. S. 586, 589 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No.

BRAEBURN SECURITIES CORPORATION, an Illinois corporation,

Appellant,

vs.

ELBERT S. SMITH, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois; and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF ELBERT S. SMITH, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BENJAMIN S. ADAMOWSKI, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS, TO DISMISS OR AFFIRM.

Appellees Elbert S. Smith, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, move that this appeal be dismissed on the ground that it does not present a substantial Federal question, or in the alternative, that the judg-

ment of the Supreme Court of Illinois be affirmed because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

LATHAM CASTLE,
Attorney General of Illinois,

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois,
Counsel for Appellees.

STATEMENT.

The Pleadings.

The Complaint was filed August 23, 1957. It alleges that:

Braeburn Securities Corporation is an Illinois corporation which filed its Articles of Incorporation February 6, 1956.

The Articles of Incorporation were amended on February 23, 1956, and as so amended, granted Braeburn Securities Corporation the power of purchase, own and hold the shares of capital stock of banks and bank holding companies and shares of capital stock of any non-banking corporation.

Braeburn Securities Corporation is engaged in the general investment securities business and proposes to exercise all the powers conferred on it in its Articles of Incorporation.

Braeburn specifically proposes to acquire shares of stock in two or more Illinois banks in quantities in excess of 15% of the outstanding shares of such ba ks.

The Complaint then alleges that Senate Bill 410, enacted by the 70th General Assembly of the State of Illinois and known as "The Bank Holding Company Act of 1957," and Senate Bill 411, also enacted by the 70th General Assembly and known as "An Act to Amend Section 5 of 'The Busi-

ness Corporation Act," filed July 13, 1933", are both invalid, unconstitutional and void by reason of numerous constitutional objections including the objection that the legislation violated the equal protection clause of the 14th Amendment to the Constitution of the United States.

The Complaint sought a declaratory judgment declaring the two acts invalid, unconstitutional and void.

Motions to dismiss were filed by the defendants (Abst. of Rec., pp. 16-17)[1] on the grounds that the Acts complained of are valid and constitutional.

The Decision of the Circuit Court of Cook County, Illinois.

On March 5, 1958, the Circuit Court of Cook County, Illinois entered a declaratory judgment (Abst. of Rec., pages 18-20) finding that Senate Bill 410, known as the Bank Holding Company Act of 1957, and Senate Bill 411, known as An Act to Amend Section 5 of the Business Corporation Act, were invalid

> "in that said laws violate Secs. 13 and 22 of Art. IV, Secs. 2 and 14 of Art. II, and Sec. I of Art. XI of the Constitution of the State of Illinois, and also violate Sec. I of the 14th Amendment of the Constitution of the United States."

The Decision of the Supreme Court of Illinois.

On September 18, 1958, the Supreme Court of Illinois entered a final judgment reversing the Circuit Court of Cook County. The Supreme Court of Illinois delivered an opinion finding the legislation to be constitutional.

---

[1] References to the Abstract of Record, here and elsewhere, are to the Abstract of Record filed May 8, 1958, in the Supreme Court of Illinois and designated as a part of the record by appellant's notice of appeal.

The Context of the Legislation.

In considering the present question, it will be helpful to understand the context in which the Bank Holding Company Act of 1957 was adopted by the Illinois legislature.

By the middle 1950's, it had become apparent that legislation was required to restrict the development of bank holding companies. It was felt that a further concentration of holdings by companies of bank stock would be against public interest.

State prohibitions on branch banking, moreover, could by means of bank holding companies be circumvented. Interstate bank holding companies can reach across state lines and dominate local banking institutions.

The Federal Bank Holding Company Act of 1956.

On May 9, 1956, the 84th Congress adopted the Federal Bank Holding Company Act of 1956. This was the first federal legislation enacted dealing with bank holding companies. This Act is set out in part in Appendix "D" to the Jurisdictional Statement.

The Federal Act provides that no company shall become a bank holding company except with the prior approval of the Board of Governors of the Federal Reserve System (Section 3). All bank holding companies face divestiture of non-banking interests, and their activities are limited to the management and control of banks.

One of the principal objectives of the Federal Act was to prevent any lessening of competition in the banking business. Because of the importance of the banking system to the national economy, Congress believed that adequate safeguards should be provided against undue con-

centration of control of banking activities. The House Committee Report stated:

> While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks. House Committee Report No. 609, 84th Congress, 1st Session, page 2.

Although Congress has repeatedly been urged to break down the restrictions in the national banking law regarding branches of national banks and to permit branches regardless of state bank laws, Congress has left the matter of branches to the states to determine, each state for itself.

The concentration of banking control into fewer hands has been accomplished, however, to a certain extent through the holding company device whereby control of a group of banks has been acquired and the banks have been thereafter operated, in effect as branches. It was believed that the declared will of Congress in favor of independent competitive banking was being thwarted by indirect branch banking, through the mechanism of the holding company. (See page 3 of House Committee Report No. 609.) Without such legislation as this Act, the almost unrestricted ability of a bank holding company group to add to the number of its banking units made it possible for the concentration of commercial bank facilities in a particular area under a single control and management.

"Bank Holding Company" is principally defined in the Federal Act as any company "which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company" by virtue of the act (section 2). There are certain

exceptions in the definition and in section 3, some of which are copied verbatim in the Illinois Act.

Reservation of Right to States to Restrict Acquisition of Bank Stock.

The Federal Act also gives recognition to a state's right to control the ownership of banks within its boundaries. In Section 3 (d) it provides:

> "Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." May 9, 1956, c. 240, section 3, 70 Stat. 134, 12 U. S. C. A. § 1843(d).

Also included in the Federal Act in Section 7 is the following general reservation of right to the states:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." May 9, 1956, c. 240, section 7, 70 Stat. 138, 12 U. S. C. A. § 1846.

The significance of section 7 was emphasized in the report of the Senate Committee on Banking and Currency when it reported the Act:

> ". . . Another provision of this bill expressly preserves to the States a right to be more restrictive

regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards State's rights as to bank holding companies." Senate Committee Report No. 1095, 84th Congress, 2nd Session.

Illinois is but one of the states that enacted bank holding legislation in 1957 to take advantage of the Federal Act. Among the other states are New York, New Jersey, Pennsylvania and Indiana. As far as can be ascertained none of these laws have been questioned in the courts.

The Classification Made in the Illinois Bank Holding Company Act of 1957.

The purpose of the Illinois Bank Holding Company Act is to prevent greater concentration of control over Illinois banks. The Act is thus directed at restricting companies from acquiring large stock interests in independent banks. The Act prohibits certain additional stock acquisitions. The Act does not restrict the present ownership of bank stock nor does it do away with any property rights.

Section 2(c) of the Act defines "bank holding company" as any company—

> "which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks or of a company which is a bank holding company by virtue of this Act."

The definition goes on to include companies which even though owning less than 15% of the stock, manage in other

ways to control two or more banks and provides certain exceptions not complained of in this action. The full text of the Act appears in Appendix "D" in the Jurisdictional Statement.

Section 3 of the Act makes it unlawful:

> "(1) for any action to be taken hereafter which results in a company becoming a bank holding compans as defined in this act; (2) for any bank holding company hereafter to acquire direct or indirect ownership or control of any voting share of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank. . . ."

The Act is thus directed at acquisitions. It does not expressly establish any classifications. But for the sake of making clear Braeburn's complaint there can be said to be implicit in the Act the following classification:

Class One: Companies which on the effective date of the Act owned 15% or more of the stock in (or in other ways controlled) two or more banks.

> These companies are referred to as "bank holding companies". Such a company may not acquire any additional bank stock in the banks in which it already owns 15% or more of the stock.
>
> As to any bank in which a bank holding company owns no stock or less than 5% of the stock on the effective date of the Act, the company may acquire stock so that its total holding does not exceed 5% of the bank's stock. If the company owns more than 5% of the stock of a bank, it may not acquire any more stock of that bank.
>
> A special exception permits purchase of additional shares if any company owns more than 50% of a bank's stock. Such acquisitions could not make any practical difference in the extent of control. Section 3(1).

Class Two: Companies which on the effective date of the Act did not own 15% of the stock of more than one bank.

> Such a company is prohibited from acquiring stock if it would result in the company holding a 15% stock interest in two or more banks. Such companies may hold any amount of stock in one bank, and may acquire up to 15% of the stock in any number of additional banks.

It can therefore be said that the Illinois Legislature has determined:

> (a) that the existing degree of concentration of bank stock holdings is tolerable, and that the public interest does not require divestiture of such stock holdings;
>
> (b) that additional large acquisitions of bank stock by companies will have a tendency to create conditions not in the public interest; and
>
> (c) that additional acquisitions by bank holding companies should be even more severely restricted (being limited to 5% of a bank's stock) than acquisitions by non-bank holding companies (which companies can purchase up to 15% of the stock of any bank).

By this classification the Legislature, without requiring an existing bank holding company to divest itself of bank stock effects its purpose of restricting further concentration of control of banks. There is nothing arbitrary in such a classification.

In this connection, it should be noted that bank holding companies in existence on the effective date of the Act are effectively limited in expansion in two ways. The Act limits their expansion through purchase of additional bank shares or by acquiring corporate control of an additional bank by other means, direct or indirect. At the same time, expansion of the banks themselves which are part of such a holding company group is limited by the Illinois banking

law which prohibits the establishment of branches. Chap. 16½, Ill. Rev. Stat. 1957, Section 106.

The situation is thus altogether different from a law which prohibits certain new manufacturing or commercial businesses, while permitting those engaged in the same business on the effective date of the act to continue without restriction. In such a case the manufacturing and commercial enterprise can effectively expand their operations without restriction. The nature of a holding company is different. Its "operations" consist of financial ownership and control and its growth can only take place by acquiring more bank stock. But such acquisitions are severely restricted by the Act.

The Illinois Legislature was therefore in a position to appraise the present degree of concentration of bank stock in company control in Illinois and to decide that this degree of concentration might safely continue, knowing that such companies could not expand, nor use their position in any way detrimental to the community. At the same time the Legislature decided to restrict additional bank stock acquisitions by companies, in the belief that such acquisitions might have a tendency to undermine the independence of unit banks to a point inconsistent with the public interest.

The resulting pattern of laws presents a classification not unlike that of the federal anti-trust laws. Section 7 of the Clayton Act prohibits stock acquisitions where "the effect of such acquisition may be to substantially lessen competition . . ." 15 U. S. C. § 18. As pointed out in *United States* v. *du Pont & Co.*, 353 U. S. 586, 589, "The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended."

On the other hand, divestiture of stock acquired by companies prior to the adoption of the Clayton Act could only

be ordered under the Sherman Act, on proof that there was in fact such a restraint or monopoly. Because Congress did not require stock divestiture in existing situations, it was not prevented by the Constitution from restricting future stock acquisitions which might have an undesirable tendency.

What the plaintiff corporation seeks, as is evident from its charter and its allegations in the complaint (Abst. of Rec., p. 4) is *the right to buy up control in Illinois banks which are now independent.* This it is prevented from doing by the Act. But every other company regardless of when organized is also prevented from buying up the stock in these banks. The Act gives no company preference over plaintiff as to the acquisition of the stock in any independent bank.

In fact, as has been pointed out, certain companies (those companies, if any, owning 15% or more of the stock of two or more banks on the effective date of the Act) may not buy as much of the stock of any independent bank as may plaintiff.

The Illinois Legislature determined that the existing bank holding companies within the state should be frozen at their present size and, being so limited, are tolerable. But this provides no reason why the plaintiff must be given free license to acquire any amount of stock in any number of Illinois banks. Plaintiff's argument that the Constitution guarantees it such a right is without foundation.

SUGGESTIONS IN SUPPORT OF THIS MOTION TO DISMISS OR AFFIRM.

I.

The Federal questions tendered by this appeal are not substantial and do not need further argument.

The chief federal question complained of by plaintiff in its complaint and argued below is that the Illinois Bank Holding Company Act violates the equal protection clause of the 14th Amendment. Plaintiff claims that unlawful inequality results from the provisions of the Illinois law which restrict companies from additional acquisitions of bank stock. It has been pointed out the Act divides companies into two classes and restricts to different extent the additional acquisitions of bank stock by each. Companies like plaintiff which have not yet acquired 15% of the stock of 2 or more banks are *less* severely restricted as to future acquisitions than companies of the other class.

That the Act does not require divestiture of bank stock provides no grounds for complaint on a record which contains no evidence that the present degree of concentration of holdings of bank stock in Illinois is against the public interest or is in any way harmful to plaintiff.

The Supreme Court of Illinois has carefully considered the claimed violation of the equal protection clause of the 14th Amendment. Section 22 of Article IV of the Illinois Constitution prohibiting the legislative grant of special privileges has been held to involve the same test of what constitutes an arbitrary classification, as the equal protection clause of the 14th Amendment, *Stewart* v. *Brady*, 300 Ill. 425; and the claimed violations of the state and federal

constitutional provisions were considered by the Illinois court together. (See Appendix B, pp. 14a-15a, Jurisdictional Statement.)

The Illinois court pointed out the presumption in favor of legislative classification and the failure of this record to show any indications of an arbitrary character in the classification.

Plaintiff also claims that any state regulation of the holding of stock in national banks located within the state is unlawful under *McCulloch* v. *Maryland,* 4 Wheat. 316. This claim was not accepted by either the Circuit Court of Cook County or the Supreme Court of Illinois and is without merit. The rule of *McCulloch* v. *Maryland* is directed at burdensome and discriminatory interference with the operations of a national instrumentality. No such interference is present here. This claim does not present a substantial federal question. In any event this claim is not before the Court, appellant having failed to take any cross appeal from the decision of the Circuit Court of Cook County.

II.

The alleged invalidity of The Illinois Bank Holding Company Act of 1957 by reason of a federal preemption of the field of bank holding company legislation is raised for the first time in this appeal.

Nowhere in its complaint does plaintiff ever refer to the Federal Bank Holding Company Act of 1956.

The federal law as shown above, p. 6 authorizes State legislation of the kind here challenged and prohibits a bank holding company from purchasing bank stock across state

lines unless specifically authorized by the state in which the bank is located.

The plaintiff's position on this point is not only unsubstantial and contrary to the federal law, it may not even be raised at this point in the proceeding.

For the reasons stated, the appeal should be dismissed or the judgment of the Supreme Court of Illinois should be affirmed without further argument.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago 1, Illinois (FI 6-2000)

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County,
County Building, Chicago, Illinois,
FR 2-3000,
Counsel for Appellees.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
Assistant Attorneys General,

FRANCIS X. RILEY,
Assistant State's Attorney,
Of Counsel.

CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, one of counsel for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 17th day of March, 1958, I served copies of the foregoing Appellees' Motion to Dismiss this Appeal or Affirm the Judgment of the Supreme Court of Illinois as follows:

By mailing of five copies to:

Messrs. John A. Bussian, William M. Doty, and Gerald M. Chapman,
208 South La Salle Street,
Chicago 4, Illinois,

in duly addressed envelope, postage prepaid.

RAYMOND S. SARNOW,
One of Counsel for Appellees.